

PETROLEUM TANK RELEASE COMPENSATION BOARD  
MINUTES  
Business Meeting  
November 19, 2007  
Department of Environmental Quality  
Metcalf Building Room 111, 1520 East 6<sup>th</sup> Avenue  
Helena, MT

Board members in attendance were Theresa Blazicevich, Greg Cross, Karl Hertel, AJ King, Adele Michels, Steve Michels, and Roger Noble. Also in attendance were Terry Wadsworth, Executive Director, and Paul Johnson, Board attorney.

Presiding Officer Cross called the meeting to order at 10:01 a.m. He welcomed Mike Trombetta back from extended military duty and thanked him for his service.

**Election of Officers**

Ms. Michels nominated Greg Cross for the position of Presiding Officer. Mr. King seconded. **The nomination was unanimously approved.**

Mr. Hertel nominated Roger Noble for the position of Vice Presiding Officer. Ms. Blazicevich seconded. **The nomination was unanimously approved.**

**Approval of Minutes**

**Mr. Noble** moved to accept the minutes of the September 17, 2007 Board meeting as written. Mr. King seconded. **The motion was unanimously approved.**

**Eligibility – City Service West, Kalispell, Fac #15-02330, Rel. #1208**

Mr. Wadsworth provided a summary of the release history. The release was discovered on May 13, 1992 and reported to DEQ on May 15, 1992. At the time the release was discovered the eligibility law and rules required the owner to notify the Department of the release within 24 hours. The staff recommends the release be determined ineligible due to the violation of the 24 hour rule then in effect.

Mr. Noble informed the Board that this release is at the same facility as another that is on the agenda for consideration, Michel's West Exxon. Mr. Noble's firm is involved with Michael's West Exxon as a third party claimant, and will abstain from consideration of both Release 1208 and 4587. Mr. King informed the Board that he also has relationships with City Service and Michael's West, and will also abstain from consideration actions regarding the two releases.

Presiding Officer Cross asked if a quorum was still present. Mr. Wadsworth stated that the requirement for a quorum concerned the number of members present, not the number of members voting. Therefore, a quorum of members is present at the meeting.

**Ms. Blazicevich moved** to ratify the staff recommendation to determine the release ineligible. Mr. Hertel seconded.

Kary Tonjum, City Service Valcon, addressed the Board. He noted that the release was discovered when some old bulk tanks at the back of the property were removed in 1992. According to the 24-hour report, the release was discovered on May 12 or May 13 and DEQ was notified on May 15, 1992. He believes there is some confusion about when the release was reported, because samples were not taken until the 15<sup>th</sup>. The Phase I Site Investigation Report shows that samples were taken on May 15, while employees of the MDHES (predecessor to DEQ) were present at the site and the excavation was open. The report also states that MDHES noted a petroleum odor and sheen on the water, warranting further investigation. The excavated soils were moved to another part of the property and land farmed for about two years. Nothing more has been done in the past 15 years.

Mr. Tonjum said that all the samples taken around the tanks were clean, except for when the DHES representative came and the odor and sheen were present. More excavation was done at that point and City Service believes it was classified as a release at that point.

Ms. Blazicevich asked Mr. Tonjum if he had a copy of the report DHES completed. He provided his copy to her for her review.

Ms. Blazicevich said the report notes the date discovered as May 12<sup>th</sup> or 13<sup>th</sup>, and the date of notification as May 15<sup>th</sup>. It also notes that Jeff Kuhn and Greg Vandenberg checked on the stockpiled soil and UST excavation on May 20<sup>th</sup>. It does not say that anyone from DHES was present at the site.

Ronna Alexander, Petroleum Marketers Association, remarked that back in the early 1990's there was a lot of confusion around the 24 hour release reporting and suspected versus confirmed release. As a result of that confusion the rules were later clarified. She is sure there are cases with similar circumstances where the Board set precedent by finding sites eligible when the owner has shown due diligence even though the report was not made in exactly 24 hours.

Presiding Officer Cross summarized the matter. Tanks were pulled and contamination was discovered. The release was called in at some time between 24 hours and 48 hours. The delay in notification did not add to the potential contamination of the property. The soil that was removed was subsequently farmed on site until clean. There are no monitoring wells on the site. The owner / operator brought this matter to the Board to get a determination of eligibility in case further work is required at some future date. He asked if the owner/operator intended to ask the Department (DEQ) for a no further action letter.

Mr. Tonjum said yes.

Burl French, Northwest Fuels (NWF), stated that he was on that project from the beginning. He said the discrepancy is whether there was contamination initially when the tanks were removed. He has reviewed his files and tried to recreate what happened. At that time there was question whether there was contamination at all. They were dealing with local sanitation personnel, not DEQ personnel, who relied on NWF to determine if there was contamination that needed to be called in. He said removal of the tanks took a day to a day and a half and there was no contamination present. When they returned the following morning, there was sheen on the water and the release was called in. If there was a delay in notification, it was because there were questions about whether there was enough contamination present to warrant calling in a release. Notification was made within 48 hours, despite questions of whether there was contamination there at all.

Presiding Officer Cross called for a vote on Ms. Blazicevich's motion to accept the staff recommendation to find the site ineligible. Ms. Blazicevich, Mr. Hertel, Ms. Michels, and Mr. Michels voted to approve the staff recommendation. Mr. King and Mr. Noble abstained. **The motion was approved.**

#### **Eligibility – West Parkway Truck Stop, Billings, Fac #56-04951, Rel. #4496**

Mr. Wadsworth stated that Board staff is recommending the release be determined ineligible due to violation of several regulations concerning release detection, reporting, and recordkeeping.

Presiding Officer Cross asked for a motion to support the staff's recommendation. There was none.

Joe Laudon, Resource Technologies, addressed the Board on behalf of Stockton Oil Co. He stated that the release occurred from a slaved dispenser line from diesel tank 9. The compliance inspection was conducted in late 2002, with a deadline of March 2003. All the violations were corrected by the March deadline. Some were paperwork related and were quickly corrected. Marketing Specialties believes two of the violations were the result of errors by the inspector, who did not recognize the line leak detection or the line protection. In addition, line leak detection tests will not catch slaved lines. Tank 9 was out of compliance for annual line tightness testing at the time the release occurred. However, the leak was not a result of a leaking fitting, but of a customer driving off with the hose still in his tank, yanking the hose and cracking the line. After this event, the owner tested the slave line three times, failing twice and passing once. The owner then excavated the line, and found and repaired the crack. The violation of the line leak detection did not affect the timeliness of discovery or the severity of the leak. In addition, soil borings and monitoring well analytical results show there are no impacts to the groundwater from this release. The groundwater effects observed are from an older, eligible release. He stated that Mykel Stockton, owner of the property was available if anyone had any questions.

Presiding Officer Cross asked for an explanation of the magnitude of the contamination.

Mr. Laudon said samples were taken at the two slave dispensers. The sample from the release area, at a depth of 14.5 to 15.5 feet showed TPH 1120mg/kg. Results from the area of the other slave dispenser, which appears to have old historic contamination, at a depth of 9 to 10 feet show TPH at 34,500 mg/kg. The current release is on top of the older release, and is much smaller. It does not appear the contamination reached the water table. He noted that, despite soil

contamination over much of the site from previous releases, the water table, at 18 feet below ground surface, has not been impacted much.

Presiding Officer Cross noted that, with contamination evident over much of the facility, if DEQ decides excavation is necessary it will be an extensive project. The Board would be challenged to determine what percentage of excavation costs to attribute to each release at the site.

Matt McDermott, DEQ UST Compliance, commented that, while Mr. Laudon was correct that normal line tightness tests will only test from the tank to the main dispenser, not slaved lines, an annual line tightness test for that specific line is possible and is an option for the compliance requirement. He also stated that the original inspection was conducted in December, 2001 and the re-inspection was not conducted until February 2003.

Mr. King asked why compliance records were not maintained.

Mr. Stockton stated that they were found, but were not on site. Stockton Oil took over the facility from another owner and provided the inventory, while someone else was leasing the building. The records were maintained at Stockton's office, instead of on site. The facility is currently run as a commercial site and is un-manned.

Mr. King asked whether not having the records on site was a major violation, especially if they could be produced fairly quickly.

Mr. McDermott replied that it is considered a major violation.

**Mr. Noble moved** that the Board consider 60% reimbursement for the release.

Paul Johnson, Board attorney, commented that he did not know of any legal basis for splitting out the percentage of eligibility on a release. The statute requires that a release be determined either eligible or not eligible.

Presiding Officer Cross requested clarification from Mr. Wadsworth concerning previous percentage recommendations addressed by the Board, and asked if it was part of the Board's discretionary authorities.

Mr. Wadsworth stated that sometimes, after eligibility has been determined, some violation occurs, at which time the Board may determine a percentage adjustment to reimbursement of claims.

**Mr. Noble revised** his motion, **moving that release #4496 be determined eligible**. Mr. King seconded. Ms. Michels, Mr. Noble, Mr. King and Mr. Hertel voted aye. Ms. Blazicevich and Mr. Michels voted no. **The motion was approved**

Mr. Noble stated that his rationale for determining the release eligible was that the owner produced the required records in a timely fashion and earnestly proceeded to remain in compliance.

**Mr. Noble moved that the site be granted 60% reimbursement because of the violations that did occur.** There should be some penalty for the violations, and this is consistent with prior decisions by the Board. Also, given the magnitude of the spill, that amount would address any remedial actions.

Mr. Johnson stated that the Board has authority to make adjustments of this type under §75-11-309(3), MCA and rule ARM 17.58.336(7). He asked if a period of non-compliance had been established. He noted that the rule provides a table of reimbursement percentages based on periods of noncompliance, but allows the Board to adjust that rate if the owner/operator can show that certain factors, listed in 17.58.336(7)(e), entitle the owner/operator to an adjustment of reimbursement percentage. That subsection would serve as a basis for Mr. Noble's motion.

Mr. Wadsworth replied that the period of violation was greater than 180 days. Board staff recommendation would be zero reimbursement.

Mr. Johnson reminded the Board that there is a procedure in place for an owner/operator to present arguments concerning adjustments to the table of reimbursements, based on factors noted in 17.58.336(7).

Ms. Michels seconded Mr. Noble's motion. Mr. Michels, Mr. Noble, Ms. Michels, Mr. King and Mr. Hertel voted aye. Ms. Blazicevich voted no. **The motion was approved.**

**Claim Adjustments – Michel's Exxon, Kalispell, Fac #15-02330, Rel. #4587**

Mr. Wadsworth provided a summary of the release history. The release was discovered on July 25, 2007. At the time the release was discovered the UST system had a valid operating permit and the Board staff recommended the release be determined eligible. However, the reimbursement statute (§75-11-309, MCA) requires that the owner/operator must comply with the reimbursement section of the law, which requires compliance with applicable laws and rules. The owner/operator has not complied with the law. The owner/operator did not notify the Department of unusual operating conditions within 24 hours. The Department was not notified of the unusual operating conditions (sump alarm activation) until the release was discovered on July 25, 2007, 84 days later. The staff is recommending that reimbursement be reduced to 50% due to the violations.

Mr. Wadsworth reminded the Presiding Officer that two members of the Board indicated that they would abstain from the discussion and votes concerning this release.

Scott Gestring, Petroleum Technical Section, advised the Board that examination of the inventory control records for May, June and July showed a loss of 10,000 gallons. There are soil and groundwater impacts, the fuel entered and traveled along the utility corridors to the storm sewer, which discharged into surface water downstream from the facility.

Presiding Officer Cross noted that the sump alarms were being activated by water filling the sumps. He asked if that situation resulted in the alarms being disregarded when the leak actually occurred.

Mr. Gestring stated that the alarms only indicate that there is fluid in the sumps. The inventory control records are what indicate the amount of the leak.

Mr. Wadsworth stated that evidence shows there was a boot that was off in one of the sumps that allowed the fuel in the containment system to escape to the environment.

Presiding Officer Cross asked Burl French, North West Fuel Systems, to explain how UST systems work.

Mr. French explained that in this case, there is a large plastic containment sump with several pipes coming into the sump. There are boots that seal the secondary containment to the sump. Ideally, the sump could be filled with fluid and the boots would prevent the fluid from leaking out of the sump. In this case there were one or more boots that were deteriorated and allowed the product to flow out into the environment once it reached a certain level. Some of the difficulty in this case is equipment failure.

Dan Kenney, DEQ Enforcement Division, informed the Board that an enforcement action has been requested against the facility by the Remediation Division. That action is currently going through the internal review and approval process.

Presiding Officer Cross asked how that would affect the actions the Board takes at this meeting.

Mr. Wadsworth stated that the effect will depend upon whether the administrative order is issued for violations of the Underground Storage Tank Act or some other environmental statutes. If it is not issued pursuant to the UST Act, there will be no effect. If it is, the matter may appear before the Board for adjustment of the reimbursement percentage.

**Ms. Michels moved** to accept the staff recommendation to find the release eligible. Mr. Hertel seconded. Mr. Michels, Ms. Michels and Mr. Hertel voted in favor of the motion. Ms. Blazicevich voted against the motion. Mr. Noble and Mr. King abstained. **The motion was approved.**

**Mr. Hertel moved** to accept the staff recommendation to reimburse claims at 50% of eligible costs. Mr. Michels seconded the motion. Mr. Michels, Ms. Michels and Mr. Hertel voted in favor of the motion. Ms. Blazicevich voted against the motion. Mr. Noble and Mr. King abstained. **The motion was approved.**

Tim Bechtold, representing the owner, Beargrass Holdings, addressed the Board. He noted that the previous owner, Genesis, leased the facility to Michael Hayes, the operator. Beargrass Holdings purchased the property on June 29, 2007. He discussed the fact that ARM 17.58.336(7)(e) provides the Board discretion to adjust the reimbursement schedule presented in ARM 17.28.336(7)(a) if, among other things, the delay in compliance was caused by circumstances outside the control of the owner. As soon as Beargrass became aware of the release on July 25, it responded immediately, hiring PBS&J to begin cleaning up the release. Mr. Hayes, the owner of Michael's Exxon and operator of the facility, contends he was unaware of the alarms between May 2 and July 25. Insurance has denied coverage for the event due to faulty placement of the sump and faulty installation of a pipe. Coverage has been denied to all three parties involved, the previous owner, the current owner and the operator, because of faulty installation of the pipe and faulty operating gasket

to the sumps. It would be fundamental unjust to require Beargrass Holdings to pay for something they had no knowledge of and was completely out of the owner's control. In addition, Beargrass intends to do whatever DEQ requires to complete cleanup. He asked that the Board allow, as is within their discretion, a reimbursement percentage greater than 50%. Because the Board did not allow public comment before the vote on reimbursement percentage, as is required, he asked that the Board consider his comments before voting on the matter. He also noted that Beargrass, Michael's Exxon, PBS&J and North West Fuels were available to make comments, as well.

Mr. Johnson suggested that the Board entertain a motion to withdraw the previous motion, and allow for comment from the interested parties before addressing the reimbursement percentage again.

**Mr. Hertel moved** to rescind his previous motion. Mr. Michels seconded. **The motion to rescind the previous motion concerning reimbursement percentage was approved.**

The Board recessed briefly at 11:30 a.m. The meeting recommenced at 11:43 a.m.

Charlie Vandam, PBS&J, the environmental consultant on the project, address the Board on behalf of Beargrass. Michael Blend, Beargrass Holdings, called PBS&J as soon as they were informed of the release, and PBS&J was on site within hours. The City of Kalispell had taken lead on the investigation and efforts to recover some of the fuel that spilled. PBS&J took over on July 28. Most of the fuels have been recovered. Recovery wells were installed along the utility trenches in an effort to mitigate any impacts to storm water lines, water lines and sewer lines. The work is being done in the US Highway 2 West right-of-way through Kalispell. Costs on the project through the end of November are approximately \$750,000. PBS&J feels that over 90% of the work is complete, but expects the total costs, including third-party claims, to reach or exceed \$1 Million. He reiterated that PBS&J was on site immediately, at Mr. Blend's request, and that Mr. Blend has repeatedly stated that Beargrass did what is right to clean up the contamination.

Mr. Noble stated, for the record, that the City of Kalispell hired his firm to conduct the emergency response when the release was first discovered. He was on site for the first three days, after which time the project was turned over to PBS&J. He is recusing himself from participation in discussion and votes on this matter.

Presiding Officer Cross noted that in this situation there is an equipment failure on a seal and an improper installation of a pipe. He asked Mr. Noble what recourse is available for an owner/operator in such a case.

Mr. Noble indicated he did not know. He stated, however, that there were equipment failures that occurred. Once it was determined that the release occurred at Michael's West, everyone who was involved responded promptly. The site is at or near the intersection of the two busiest streets in Kalispell, making conduct of the remediation work more difficult. He noted that the owner operator has pursued the recommendations made by the City.

Michael Blend, Beargrass Holdings, addressed the Board. He indicated that Beargrass bought the property only three and one half weeks before the release was discovered. Their intent was to construct a car wash next to the convenience store and gas station. He stated that Beargrass has wanted to do the right thing from the beginning and took immediate action. He was informed that the release was from Michael's Exxon on the morning of July 26, and hired PBS&J immediately. He stated that the problems with the sumps and pipe involved in the release have been corrected. Mr. Hayes, the operator, installed electronic line leak detection right away. It is his hope that the Board will use its discretion to help Beargrass cover the bills, because Beargrass does not have the resources.

Presiding Officer Cross said the sump allowed the product to escape the containment system, but the pipe was the cause of the loss of fuel, and asked Mr. Blend what type of piping was involved.

Mr. Blend said it was Total Containment pipe that carried Plus fuel to the card-lock island. The pipe has been removed, so there is no Plus fuel available at that island at this time. It leaked back into the sump, and instead of being contained, the sump had a boot that was off, so it leaked into the ground rather than filling the sump. Mr. French can address why the sump containment failed.

Mr. King asked if the Beargrass lender had conducted a Phase I or Phase II investigation at the site before the purchase.

Mr. Blend said they did not.

Mr. Vandam remarked that he had asked the same question. There are three previous releases at the site, all of which are eligible. Mr. Blend did research to determine whether he should do a Phase I or Phase II investigation. He opted not to do so because there was documentation of existing releases with contamination already on site. The evidence was that the

system was working fine, the Petroleum Board was available to cover costs if there was a release, and if he were to drill holes in the ground, he would find contamination due to the prior releases.

Mr. Blend indicated he had discussions with Marcile Sigler, DEQ-Kalispell, concerning what to do if there was a release. She indicated that Beargrass would be covered as long as they reported the release and followed all the rules. He was under the understanding that they would be covered in the event there was a release.

Burl French, North West Fuels, rose to address the Board. He described the site as follows: "You've got a tank basin with secondary containment sumps on the tank, secondary containment going out to every dispenser, with primary pipe. This is a four-inch secondary containment with a primary pipe being pulled inside of that secondary containment. The line that was leaking was in a transition sump between the gas islands and the card-lock island, where this Plus line went in, made a loop and went out and over to the island. There was a bend in that pipe and it leaked in that radius of the bend in, and it was just a bunch of pinhole leaks that under pressure would actually squirt into that sump. Like we've talked about before, I think, when Michael brought it up, Total Containment was the manufacturer of that pipe. They are no longer in business. They've, due to different changes in pipe and the costs related to that, that's what we're assuming put them out of business. Other pipe manufacturers that make flex pipe, the UL labeling has actually changed in the last four or five years. Because of the problems they were having with flex pipe, and lack of having enough systems out there in the past. They call it flex pipe. . . today it's not really flex pipe, because they've had to go in and make the UL criteria so much more stringent to meet the requirement so that we don't have these problems. Unfortunately, there are systems out there today in our area, in Montana, that still have the old piping systems in there. . . . Hopefully, we'll be able to contain them if they are, or get them changed out before they do. But that's an overall picture of the whole system. Michael Blend and Michael Hayes, the minute the problem occurred, both of them were in contact with us. We acted immediately, found the leak that day, isolated that line out. Of course, the station was shut down immediately, isolated the line, determined what the problem was. Within, I believe, ten days we had electronic line leak detection installed into the system so if this would occur again it would automatically shut the system down. These were all things that Michael Hayes and Michael Blend did with no knowledge of whether they were going to be reimbursed from the Board. They felt it was the right thing to do to alleviate any problem in the future and to show they were actually concerned and wanted to do the right thing."

Presiding Officer Cross clarified that Michael Blend and Beargrass own the property and Michael Hayes leases the property from Beargrass. Mr. Hayes owns the fuel in the tanks.

Mr. French also said: "It even goes back further. There's a high water table problem there and on the installation of the sumps. Back when we initially started doing these installations twenty years ago, fifteen years ago when flex pipe first came out, the sump containment in the surface manhole were real tight, so if you had a lot of water that ran in the manhole. . . now don't confuse the sump and the manhole. The manhole is just the cover on the concrete surface. When water would run in there it would freeze and it would actually lift the lid on the manhole. There was no where for that water to go because the manhole was so tight to the lid on the sump. So the previous owner to Michael Blend hired us to go in there and. . . I'll back up. There were water problems all the time. Water would get in there, freeze, lift the sump, then the water would run in the sump and it would set the alarms off and Michael Hayes had a maintenance fellow that was cleaning those sumps on a regular basis, getting the water out of them, resetting the alarm, and this had been going on (don't hold me to this) for three or four years. Finally, the owner previous to Michael Blend hired us to go in and I think there were eleven man holes that we had to go in and saw cut out a bigger space and instead of going to a 36 inch manhole we went to a 42 inch manhole which would allow the water to get inside the manhole and dissipate into the pea gravel before it froze. It ended up making a larger gap around the sump lid so that the water wouldn't get in and freeze and lift that lid off and let the water get into the sump. So, these alarms that had been going off had been going off for a period of time, Michael would call his maintenance guy, he would come and pump the water out, reset the alarm and away they'd go. . . . Once we got the manholes changed, the sump lid problem went away and we quit having that water problem. Part of what we saw when we got over there and the grommet that held the secondary pipe that came in was all deteriorated, we felt like it was because people had been in there stepping on it, whatever, could have been just rubber fatigue. . . we replace grommets at different times just because of rubber fatigue. . . it's just part of the deal, I guess. There was an ongoing water table problem...or water problem is the point I was trying to make earlier, that had been going on for years. Not to make the situation any better, but that's part of the reason, I feel, that some of those boots in those sumps were damaged, is because of the activity in and out of those sumps, sometimes on a weekly basis." He indicated the same scenario was a uniform problem wherever there was a significant freeze-thaw cycle. "And the Total Containment pipe was a big issue years ago. We feel that's part of the reason they are out of business. They spent millions of dollars on what they call pipe pulls, where they went in, and it was more in the south where there was a lot of humidity that was affecting the pipe, and it was basically just turning it into mush. They went in and spent all this money to pull pipe and pull new pipe in, and they are out of business today. Nobody knows why, but that's one of the reasons that the industry points a finger to. And obviously there was a problem because UL has taken a look at it and changed the specification for flex pipe." When asked if he knew if the alarms that went off in April, May and July were responded to

he stated, "I don't know. I just know that Michael Hayes and Michael Blend don't ignore alarms if they know they were going off. And I know from talking to their maintenance guy that he was in and out of those sumps pumping water on a regular basis." He also stated that he believes the release actually occurred in July 2007, not earlier.

Michael Hayes, the operator of Michael's West Convenience Store, stated that they did not know the alarms went off, and if they had they would have responded immediately. The loss of fuel from this release cost him nearly \$100,000. He stated that they have been careful, safe operators for more than 10 years. The facility was recently inspected and passed the inspection. He relies on professional contractors to conduct inspections and maintenance, rather than doing the work himself. 99.5% of the fuel was lost the last few days before discovery of the release on July 25. Without the assistance of the Fund, his business will bankrupt. The Fund was created because it was known that some operators would not be able to cover the costs of remediating a release. Pollution insurance is not available. It would not be fair to deny reimbursement due to a mistake and equipment failure. He said that if the Fund is struggling, the fee should be increased rather than denying coverage to operators who need help.

Mr. Michels asked if Mr. Hayes was not aware of the alarms because employees were resetting them.

Mr. Haynes said no. He has checked with his employees, particularly his night manager, who said he did not see or hear any alarm going off. His operation is not mismanaged and they follow all the rules. He has a reputation with his insurance company of being a safe operator. He cannot understand how this could have happened without the alarms going off, but they did not. Inventories in May and June did not show a significant loss.

Mr. Hertel asked if the equipment dealer would be liable.

Mr. Hayes indicated that the leak was the result of an equipment failure. The equipment dealer is out of business, so there is no one to pursue. With the recent inspection that showed no problem, and improvements made to address the water problem mentioned earlier, he believed his operation was in good shape. He has now installed line leak detection that shuts the system down if it detects a leak, to ensure that this type of event doesn't happen again.

Presiding Officer Cross thanked Mr. Hayes for the clarification that the leak occurred catastrophically, not over a period of time, as he had believed. He also indicated that he understands how alarms can go off and not be related to fuel leaks, as the same situation has occurred at his own stations.

Redge Meierhenry, UST program told the Board he was on site on July 30, 2007. He reviewed inventory records made available by Marcile Sigler of the DEQ Petroleum Technical Section, which showed shortages from the Plus tank of 212 gallons in May, 1106 gallons in June, and 9253 gallons in July. The automatic tank gauging system recorded the first alarm on May 2, 2007 in the L-1 (unleaded) sump. No other alarms are recorded for that sump in 2007.

Once an alarm goes off, it must be acknowledged and the condition corrected or the alarm will not record another incident. The premium sump, L-2, recorded three events, the maximum number of events the ATG can store in history. These occurred July 18, July 28 and again a few minutes later on July 28. In order to record multiple events the sensor had to return to "off" or normal status. A July 25 system status printout shows the inventory for the three tanks and that L-1 and L-2 were in fuel alarm status. He noted that if you looked at the ATG, you would see a red light and an LCD display that showed which alarm was tripped. To acknowledge the alarms, a red button on the ATG must be depressed, which turns off the audible alarm, but does not reset the red light or the LCD display. Another event could not be recorded unless the condition causing the alarm was corrected. If the sump was liquid tight

Presiding Officer Cross asked for clarification that the Department's position is that the alarms were going off and someone was possibly not relaying that information up the ladder.

Mr. Vandam commented that July 25<sup>th</sup> was the day that DEQ became aware that Michael's West facility was the source of the fuel leak. This would explain why the system status report was printed on that day. Efforts were already underway to recover the spilled fuel by July 28<sup>th</sup>, and North West Fuels was probably doing diagnostics testing to figure out what had happened.

Mr. Meierhenry remarked that the July 25<sup>th</sup> system status report shows sumps L-1 and L-2 in alarm status, but it is not clear how long they had been in that status. It is possible the L-1 sump had been in alarm status since May 2, indicating the sump was not cleared and the sensor reset.

Mr. Wadsworth commented that part of the reason the staff recommends a 50% penalty on reimbursement is because it appears no one addressed the May 2 alarm, cleaned the sumps and reset the alarm. Therefore the time clock started on May 2 and ended on July 25, resulting in 84 days out of compliance.

Mr. Hertel asked whether, if he moved to set a reimbursement percentage now, could the percentage be changed later.

Mr. Wadworth indicated that it can be changed later. He reminded the Board that the Department is pursuing an administrative order against the facility, and the matter will probably come before the Board again.

**Mr. Hertel moved** to accept the staff recommendation to reimburse claims at 50% of eligible costs. He does not understand why it took so long to address the alarm from May 2. Mr. Michels seconded. Presiding Officer Cross asked for public comment.

Mr. Hayes stated strongly that they didn't know the alarm had gone off. Perhaps the alarm didn't work properly, but he stressed that they did not see alarm lights and displays and did not turn off the audible alarm and ignore the problem. The store sells between 5,000 and 10,000 gallons of fuel per day. A 200 gallon loss is less than one percent.

Mr. Bechthold asked for clarification on the effect of the potential administrative order.

Mr. Wadsworth responded that if an administrative order is issued, the Board will decide whether to impose another reduction on the amount to be reimbursed. The Board could not determine to increase the reimbursement percentage, but reduce reimbursement for non-compliance. The owner/operator has the right to appeal any decision the Board makes by requesting a hearing before a hearing examiner.

Sandi Olsen, Remediation Division Administrator, informed the Board that the Division is trying to confirm preliminary indications that people turned off the alarms. They have statements they are attempting to verify.

Dan Kenney, Enforcement Division stated that an administrative order must be issued within 120 days of the date enforcement is approved by the Director. At this time the matter is still going through the review process and enforcement action has not been approved.

Mr. Hayes asked why it has taken five months for him to be informed that someone has said the alarms were turned off. This is the first time he has heard that accusation.

Mr. Vandam asked that the Board make a decision as soon as is possible.

Mr. Michels rescinded his second of the motion.

**Mr. Hertel withdrew** his motion.

**Mr. Michels moved** to table the matter until the next meeting. Ms. Blazicevich seconded.

Mr. Hayes commented that this action is not fair.

Joe Clark, Genesis Development, the prior owner of the property, has no liability in the matter. He commented that there is a good deal of speculation around the circumstances of the release, the equipment and the alarms. The fact that has been stated is that the bulk of the spill happened right around July 25. The job of the Board is to determine matters on the basis of fact, not speculation.

Presiding Officer Cross stated that the issue is that if the losses of 200 gallons and 1100 gallons had been responded to appropriately, the larger spill might not have happened at all.

The decision to table the matter is based on the need to allow additional information to be gathered to assist the Board in making that determination, and allowing the Board to make a reasonable and appropriate decision.

Mr. Michels, Mr. Hertl, Ms. Michels and Ms. Blazicevich voted to approve the motion. Mr. Noble and Mr. King abstained. **The motion was approved**

**Ms. Blazicevich moved** to suspend payment of any claims until the matter has been resolved. Ms. Michels seconded. Ms. Blazicevich, Ms. Michels, Mr. Hertel and Mr. Michels voted to approve the motion. Mr. Noble and Mr. King abstained. **The motion was approved.**



### Eligibility Ratification

Mr. Wadsworth informed the Board of the eligibility applications before the Board. There are recommendations for eight sites to be eligible and three to be ineligible (see table below). The Board voted to determine Release 1208 at City Service West in Kalispell ineligible earlier in the meeting.

Board Staff Recommendations Pertaining to Eligibility From Sept 5, 2007 thru November 8, 2007				
Location	Site Name	Facility ID #	DEQ Release # Release Year	Eligibility Determination – Staff Recommendation Date
Missoula	Missoula County Fairgrounds	32-03180	4360 8/16/04	Eligible - 9/24/07
Kalispell	Sinclair Retail 25001	15-02094	4557 3/2/07	Eligible – 9/19/07
Hardin	Town Pump Inc	02-08703	4581 7/9/07	Eligible – 9/25/07
Kalispell	City Service West	15-02330	1208 5/13/92	Ineligible – 9/20/07
Kalispell	Nick Fullerton Architects	60-15047	4545 9/8/07	Ineligible – No applying for closure permit within 30 days.
East Helena	Canyon Ferry Mini Basket	25-03122	4584 8/13/07	Eligible – 9/28/07
Billings	Formers Earls Central Standard/former Designer Glass by SGO	56-13971	3795 7/23/99	Eligible – Tanks removed 1971 – 9/28/07
Ronan	City of Ronan Shop	24-08549	3201 July 1997	Ineligible - 10/2/07
Bozeman	Former Badgley Distributing Inc	99-95046	4576 June 2007	Eligible – 10/16/07
Billings	West Parkway Truck Stop	56-04951	4496	Eligible – <b>Reimbursement to be made at 60% of eligible costs</b>
Billings	Prestige Toyota, Inc.	56-07473	4597 Oct 2007	Eligible – 11/5/07

**Mr. Noble moved** to accept the staff recommendations, for the sites contained in the table above, with the exception of Kalispell City Service West, addressed earlier in the meeting, and Billings Prestige Toyota, Inc. Mr. Michels seconded. **The motion was unanimously approved.**

### Claims over \$25,000

Mr. Wadsworth presented the Board with the claims for an amount greater than \$25,000 reviewed since the last Board meeting. (See table below). There are three claims totaling \$109,390.48. The work at the Ben Taylor site in Valier was field investigation using geo-probes. The Former Reed Point Service Station was excavation and well drilling, with lab analysis costs. The Former Bull River Phillips site was excavation and well installation and lab costs.

Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Adjustments	Copay Met with this claim	Amount to be reimbursed
Valier	Ben Taylor Inc	37-10231	20070918F	\$31,263.31	-0-		\$15,631.66
Reed Point	Former Reed Point Service Station	60-15009	20071002D	\$25,039.44	\$3,373.89		\$10,832.78
Noxon	Former Bull River Phillips 66	60-15021	20071002E	\$53,087.73	\$634.99	X	\$46,376.21
<b>Total</b>				\$109,390.48			\$72,840.65

**Mr. Noble moved** to ratify the claims. Ms Blazicevich seconded. **The motion was unanimously approved.**

### **Weekly Reimbursements**

Mr. Wadsworth presented to the Board for ratification the summary of weekly claim reimbursements for the weeks of September 12, 2007 through November 7, 2007. (See table below). There were 282 claims, totaling \$1,714,952.84. He pointed out that there is one zero reimbursement claim included in the request for ratification. This claim, for Stromberg Sinclair, is for costs already reimbursed on a previous claim.

<b><u>WEEKLY CLAIM REIMBURSEMENTS</u></b> <b>November 19, 2007 BOARD MEETING</b>		
<b><u>Week of</u></b>	<b><u>Number of Claims</u></b>	<b><u>Funds Reimbursed</u></b>
September 12, 2007	31	\$96,203.47
September 19, 2007	49	\$99,775.95
September 26, 2007	53	\$150,134.04
October 3, 2007	24	\$142,377.79
October 10, 2007	17	\$202,065.86
October 17, 2007	22	\$192,000.78
October 24, 2007	27	\$257,627.60
October 31, 2007	53	\$205,822.57
November 7, 2007	6	\$368,944.78
<b>Total</b>	<b>282</b>	<b>\$1,714,952.84</b>

Ms. Michels drew the Board's attention to the fact that quite a few of the claims, all for slightly less than \$25,000 each, were for the two soil excavations conducted in Scobey. She indicated that the manner in which these claims were filed is intended to circumvent the requirement that the Board review work costing more than \$25,000 before claims are paid.

Mr. Wadsworth advised that the Board can ask to review work plans such as these before the field work begins. This would allow the Board to hear what the plans are before the work is started.

Presiding Officer Cross endorsed that suggestion.

Mr. Wadsworth indicated he will review upcoming work plans and make a recommendation at the January meeting concerning what pending work plans the Board may wish to review before work is begun.

Ms. Michels expressed an interest in knowing the future plans for the Holter Lake Lodge site, because the site has been in the newspaper recently.

Mr. Wadsworth suggested that, at a future meeting, the Department may be able to provide some information concerning whether the site is nearing closure. In addition, he will ask the Department to bring a status report on the Scobey sites to the next meeting.

**Mr. King moved** to ratify the weekly reimbursements as presented. Mr. Michels seconded. Mr. Blazicevich indicated that she will abstain from the vote as it relates to North Star Aviation. **The motion was unanimously approved.**

### **Proposed Board Meeting Dates**

Mr. Wadsworth noted that the proposed dates attempt to avoid school breaks and holidays. The dates include the actual meeting dates as well as the staff's preparation dates and the dates the Board packets are mailed.

Ms. Michels moved to accept the proposed dates for the 2008 calendar year. Mr. Hertel seconded. **The motion was unanimously approved.** The dates are as follows:

<u>Meeting Date</u>	<u>Pre- Meeting Date</u>	<u>Packet Mailing Date</u>
January 28, 2008	January 7, 2008	January 17, 2008
March 31, 2008	March 10, 2008	March 21, 2008
May 19, 2008	April 28, 2008	May 8, 2008
July 21, 2008	June 30, 2008	July 10, 2008
September 15, 2008	August 25, 2008	September 4, 2008
November 17, 2008	October 27, 2008	November 6, 2008

### **Department Rule Making**

Kirsten Bowers, attorney for the Remediation Division presented the Board with an update on the Department's rule-making process concerning how a release is defined and a release number is assigned. The Department published the notice of public hearing on adoption of the proposed release numbering rule and amendments to release reporting and corrective action rules on November 8, 2007. New Rule 1 is the release numbering rule and states that upon confirmation of a release from a petroleum storage tank (PST), a release number is assigned and all contamination from PSTs discovered through investigation or corrective actions to address the confirmed release are considered one release. There are three exceptions to the one-release general rule: 1) If there is substantial evidence that a release occurred after the previously confirmed release is resolved, a new release number would be assigned, or 2) Upon substantial evidence that a new release occurred after the date that the previously confirmed and numbered release was discovered, or 3) upon substantial evidence that contamination is from petroleum storage tanks at a different facility than the previously confirmed and numbered release. New Rule 1 also defines facility and petroleum storage tank for purposes of release numbering. It also provides a process for rescinding a release number if the Department determines a release should not have been confirmed.

The proposal will also amend ARM 17.56.502, the suspect release reporting rule, at (1)(j) by increasing the soil EPH level required for reporting a suspect release from 50 mg to 200 mg. The proposed amendment incorporates revisions to the Montana Risk Based Corrective Action Guidance (RBCA) and will reflect new RBSLs in that document. In addition, ARM 17.56.507 will be amended to incorporate the 2007 revisions to RBCA.

ARM 17.56.604, the remedial investigation rule, and ARM 17.56.607, the release categorization rule, are amended to correct word choice errors. ARM 17.56.608 is amended to incorporate the latest revisions to DEQ-7 and RBCA.

A public hearing will be held on the proposed new rule and amendments on November 28. Written comments must be submitted on or before December 6, 2007. They anticipate filing a notice of adoption December 10, publication of the notice December 20, and the rule becoming effective December 21, 2007.

### **Board of Investments**

Mr. Wadsworth informed the Board that the backlog of claims to be paid has been reduced from \$3.6 million to \$2.2 million by using the \$900,000 the Board had in reserve, along with revenue receipts from the MDT fee. He indicated that claim receipts are beginning to slow as a result of the work plan obligation strategy recently implemented. Currently, claims are being paid within 120 days from receipt. He anticipates that claim payment delays may begin to lessen as a result of the obligation strategy, and that by June 2008 claims should be paid within 60 days of receipt. The interest rate on a Board of Investments loan is currently 4.85%.

The Board members discussed the cost and availability of loans to contractors from the private banking market. The interest rates are considerably higher and contractors must increase their rates to recoup the costs of the loan. If the costs are high, such as with the Scobey soil excavations, the owners may not be able to secure a loan. If they are unable to have the work done, they risk being sent to enforcement, placing them in an untenable position.

Mr. King moved to borrow \$2.5 million in order to get the outstanding claims paid.

Presiding Officer Cross expressed concern that borrowing that amount would only encourage the Department to request work plans for more large and expensive projects, exacerbating the existing problem.

Sandi Olsen commented that the Department has implemented a site prioritization process that should help alleviate the concerns about controlling the Department's work. The information will be available to explain to the Board why a site was assigned a particular priority ranking. This should help the Board make decisions on what claims to pay.

Mr. Wadsworth noted that any money borrowed would be used to pay claims already processed. The obligation of work plans based on site priority began on July 1. Contractors are being notified of the obligation status of their work plans as those decisions are made. All work plans approved before July 1, 2007 are considered obligated, regardless of site priority, and will be paid as they are approved.

The motion died for lack of a second.

**Mr. Noble moved** to borrow \$1 million from the Board of Investments to fund paying off outstanding claims. Mr. Michels seconded. **The motion was unanimously approved.**

The Presiding Officer called a five minute break.

### **2009 Legislation**

Mr. Wadsworth provided a summary of the topics the legislative work group has discussed. These topics included the following items. 1) create a separate fund to handle found tanks and heating oil tanks; 2) increase the fee by one-quarter of a cent; 3) secure a one-time influx of funds from the general budget surplus; 4) create a State Revolving Fund to be used for farm and residential tanks, heating oil tanks, tanks closed in place, and USTs in the ground before 1986 or 1995; 5) various proposals concerning ASTs and efforts to encourage owners of them to secure inspections and upgrade such facilities; 6) change the co-pay required for double-wall tanks, since the Energy Policy Act of 2005 now requires such tanks; 7) explicitly not covering spills from delivery trucks while unloading fuel into USTs; 8) change the co-pay required according to one of several proposals; 9) require that owners/operators to carry private pollution insurance coverage; 10) change the maximum trigger level associated with fee shut-off; and 11) have the Board contract directly with consultants for corrective action.

He asked the Board to provide guidance on those items for which the Board would like the staff to begin drafting legislative language, such as an increase in the fee, and those items the Board would like the staff to continue to research, such as the availability of private insurance.

Presiding Officer Cross commented that it seems unlikely the Governor will support an increase in the fee, but that he feels the Board should pursue the matter, because it's mission is to assist in cleaning up the environment for the good of the State.

Ms. Olsen stated that if it can be made clear actions are being taken to solve the funding problem in the long term, the probability of success is much greater.

Mr. Livers, Deputy Director, indicated it will be an uphill climb to get support for a fee increase. But if all options that are being pursued and examined are explained, the chances of success improve. Seeking a one-time influx of money will be difficult if it is intended only to address a chronic imbalance. If there is a chronic imbalance in the fund, a long term change in the revenue stream makes more sense. He suggested cost-recovery as an alternative to a revolving fund. The Department will assist in any way it can.

Ms. Blazicevich moved draft legislation to include the following items; 1) raise the fee by one-quarter of a cent; 2) separate older found/abandoned, unregistered non-heating oil tanks from this fund and either put them in their own fund or find some way to get rid of that liability; 3) above-ground tanks and how eligibility for them will be structured, including whether they will be inspected and whether inspection will be a condition of eligibility; 4) address the co-pay on double-walled tanks; 5) any tank that is going to be eligible needs to have an inspection; if someone is not willing to have an inspection, they should not be eligible for the fund.

Mr. Noble proposed an amendment to the motion to investigate what fund balance should trigger suspension of the fee. Ms. Blazicevich accepted the amendment to her motion. Mr. Noble seconded the amended motion. **The motion was unanimously approved.**

### **Fiscal Report**

Mr. Wadsworth presented the fiscal report through October 31, 2007. He noted that the ending net worth balance was approximately negative \$471,000.

### **Board Attorney Report**

Mr. Johnson presented the attorney's report. He noted that the Supreme Court has not yet been determined whether there will be oral argument on the Town Pump Dillon case.

Location	Facility	Facility # & Release #	Disputed/ Appointment Date	Status
Boulder	Old Texaco Station	22-11481 Release #03138	Eligibility 11/25/97	Dismissal Pending because cleanup of release completed.
Thompson Falls	Feed and Fuel	45-02633 Release #3545	Eligibility	Case was stayed on 10/21/99.
Eureka	Town & Country	27-07148 Release #03642	Eligibility 8/12/99	Hearing postponed as of 11/9/99.
Butte	Shamrock Motors	47-08592 Release #03650	Eligibility 10/1/99	Case on hold pending notification to Hearing Officer.
Whitefish	Rocky Mountain Transportation	15-01371 Release #03809	Eligibility 9/11/01	Ongoing discovery. No hearing date set.
Lakeside	Lakeside Exxon	15-13487 Release #03955	Eligibility 11/6/01	In discovery stage.
Helena	Noon's #438	25-03918 Release #03980	Eligibility 2/19/02	Case stayed.
Belt	Main Street Insurance	07-01307 Release #3962		Eligibility tabled 6/25/01 currently Insurance coverage
Dillon	Town Pump #1	01-08695 Release #4144	Eligibility – contested 03/07/05	Case fully briefed in MT Supreme Court. Awaiting court decision.
Great Falls	On Your Way	07-09699 Release #3633	Adjustment to future claims	<b>Hearing requested 2/15/07 Awaiting identification of attorney</b>
Lewistown	On Your Way	14-09853 Release #3790	Eligibility contested	<b>Hearing requested 2/15/07 Awaiting identification of attorney</b>
Whitefish	Stacey Oil - Don Gray	15-04428 Release #1034	Adjustment to future claims	<b>Hearing requested 2/15/07 Awaiting identification of attorney</b>
Silver Gate	Hightower property	56-14109 Release #4274	Eligibility contested 5/29/07	<b>Hearing requested 5/29/07. Hearing stayed until Supreme Court rules in Dillon matter</b>
Havre	Cenex Supply & Marketing	21-07467 Release #826	Eligibility contested 8/14/07	<b>Scheduling Order signed 8/28/07. Hearing set for 7/21/08</b>

Mr. Johnson then left the meeting at 1:38 p.m.

### **Board Staff Report**

Mr. Wadsworth drew the Board's attention to the fact that the Board has reimbursed 84% of all the claims that have come in calendar year 2007, as compared to 79% of 2007 claims at the September Board meeting.

In response to a question from the September 2007 meeting concerning mobilization costs on certain claims paid by the Board, Mr. Wadsworth reminded them that the task listed on the weekly reimbursement tables reflects the largest task, by dollars claimed, in each claim. He presented a breakdown of the tasks for the claims showing the mobilization task. He stated that, in some cases, contractors who mobilize long distances will combine visits to two or more sites in one mobilization, thereby reducing the mobilization cost to each individual site. He reported that mobilization is a small percentage of the costs reimbursed by the Fund at this time. It is a good idea to encourage owners/operators to use local consultants, or to work with them to remove mobilization as a charge for work done.

### **Petroleum Technical Section Report**

Amy Steinmetz presented an explanation of the current, updated PTS Priority Ranking System. The changes to the system speed up the process of ranking a site, and remove some of the subjectivity inherent in the previous system. She noted that currently there are roughly 180 priority one release, those that require characterization or present an imminent threat to health and safety, and about the same number of priority six sites, those that are currently in long-term groundwater monitoring status. The current ranking system more accurately communicates the status of DEQ's petroleum remediation caseload. It is allowing them to better communicate which sites need immediate funding from the Petro Fund.

Mike Trombetta, Hazardous Waste Cleanup Bureau, told the Board that DEQ Draft Guidance Document #15 gives a narrative description of how the prioritization system works.

He also indicated that there have been 49 releases during calendar year 2007, which is about average. Many are found tanks and small spills, with the occasional large release.

### **Public Forum**

Barb Smith, Financial Analyst – Legislative Fiscal Division, informed the Board that Representative David Wanzenreid had asked her for a fiscal analysis of the Fund. She completed the analysis in October and provided a copy of the report to DEQ and Mr. Wadsworth. The status of the Fund has been added to the Environmental Quality Council meeting agenda for January 10<sup>th</sup> or 11<sup>th</sup>, in order to discuss potential legislation to alleviate the Board's funding difficulties.

The Fiscal Division has been working on a performance measurement project to which agencies, when they have financial issues, can report during the interim between legislative sessions. The Division is preparing a report on DEQ, including the solvency of the Petro Fund. That report will go to a subcommittee of the Finance Committee three times during the interim. The sub-committee may then ask the staff to provide additional information, prepare legislation or raise the matter to the Committee level.

She noted that any proposal for an increase in the per gallon fee must be part of a comprehensive plan. It should also be made clear in the legislation that the increase in fee is intended to pay claims.

The meeting adjourned at 3:29 p.m.

---

Greg Cross – Presiding Officer